

**Selected Documents from Claim File**

**Claim No. LRF-1999-0810-01**

Claim Amt. : \$14,267.47 Initial Entry Date : 08/30/1999

Claimant : Anderson Lumber Company

Property Desc. : See Comments

Property Addr. : 2929 W Ella Cir

West Jordan, UT 84084

STATUS : DENIED (CONTRACT NOT PAID IN FULL)

Comments Page: 001 UserID: kschwab

All of Lot 302, Camelot #3, according to the official plat thereof as filed in the office of the Salt Lake County Recorder, Salt Lake City, Utah

## Associated Addresses

**Type : Claimant Legal Counsel**

DOPL # : - -

Firm Nm :

Name : Randy J Christiansen

64 N 100 E

Provo, UT 84606

(801) 373-0131

**Type : Claimant Address**

DOPL # : 98-314987-0000

Firm Nm : Anderson Lumber Company

Name : Wil Moyer, Credit Manager

4300 Harrison Blvd

PO Box 9459

Ogden, UT 84409

(800) 333-3345

**Type : Home Owner - Secondary**

DOPL # : - -

Firm Nm :

Name : Nanci E McConnell

2929 W Ella Cir

West Jordan, UT 84084

( ) -

**Type : Home Owner - Primary**

DOPL # : - -

Firm Nm :

Name : Steve McConnell

2929 W Ella Cir

West Jordan, UT 84084

( ) -

**Type : Non-Paying Party Legal Counsel**

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DOPL # : - -

Firm Nm : Jensen Duffin Carman Dib &amp; Jackson

Name : W. Kevin Jackson

311 S State St Suite 380  
Salt Lake City, UT 841115215

(801) 531-6600

**Type : Non-Paying Party - Primary**

DOPL # : 93-266922-5501

Firm Nm : Sandalwood Homes

Name : Martin Alyin Nielsen

9563 S 2700 W

South Jordan, UT 84095

(801) 968-8505

**Type : Original Contractor/Developer**

DOPL # : 93-266922-5501

Firm Nm : Sandalwood Homes

Name : Martin Alyin Nielsen

9563 S 2700 W

South Jordan, UT 84095

(801) 968-8505

#### DEMOGRAPHIC INFORMATION

Claim #: LRF-1999-0810-01 Claimant: Anderson Lumber Company

DOPL Licensee: yes

Entity Type: Corporation

Number of Employees: 100+

Gross Annual Revenue: 5M AND UP

Years In Business: 20-49

Claiming Capacity: Supplier

#### NON-PAYING PARTY

DOPL Licensee: no

Entity Type:

#### CLAIMS PROCESSING INFO

	Date Recieved	Date Forwarded
Front Desk	08/10/1999	08/10/1999
LRF Special-Setup, Filing, CRIS	08/30/1999	08/30/1999
Permissive Party Response	09/30/1999	DEADLINE*****
Screen C/D Letter	10/22/1999	

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Conditional denial letter send October 22, 1999, with response due date of November 22, 1999.

Reasons for conditional denial as follows:

1. Judgement is invalid for two reasons. First, findings clearly state the judgement is not binding on the NPP because of bankruptcy. Second, judgement orders payment by LRF but LRF was not a party to the suit.
2. NPP is contesting payment in full.

3. The only evidence of a written contract and qualified services is the findings contained in the invalid judgement.

Received extensive response to conditional denial letter. Also received evidence from Original Contractor refuting some of Claimant's evidence. Processing claim to provide summary of evidence. No recommendation will be made.

Substantive Review 12/06/1999

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Examiner will not make a recommendation on this claim. As can be seen in the Factual Findings, some items of the claim must be litigated at a formal hearing for a decision to be made. This report serves only to summarize the claim.

One point of note, the claim was originally filed as informal. However, no judgement was entered against the NPP. Rather, Claimant acknowledged the NPP was protected by bankruptcy and had the judgement entered against the Fund. The Attorney General's Office does not consider that judgement valid as the Fund was not named as a defendant in the complaint. Therefore, the claim should have been filed as a formal proceeding. The claim was reclassified and processed accordingly--including the Fund personnel have disregarded all findings of fact in the judgement.

01-03-2000: Notice of Prehearing Conference sent registered mail to Martin Allen Nielsen was returned by the USPS. Hearing has already taken place.

Claim Disposition Deny

Board Disposition \*\*\*

Claims EX Screen w/AG 10/04/1999 12/06/1999

Comments Page: 001 UserID: ewebster

After initial review of claim AAG agreed claim should be treated as formal.

LRF Spec Sched Hearing	10/04/1999	10/04/1999
Board Hear Claim	12/15/1999	12/15/1999
ALJ draft Find/Con	05/01/2000	05/05/2000
Examiner Draft order	05/05/2000	05/05/2000
Division Dir Approve	05/03/2000	05/03/2000

JURISDICTIONAL CHECKLIST =====

Completion Of QS 10/19/1998

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Civil Bkcy Filing 01/13/1999

Difference 86

Comments Page: 001 UserID: ewebster

Qualified services date taken from lien copy (pg 27). Examiner has requested additional verification of qualified services because judgement is considered invalid.

Civil action date is per date stamp on complaint (pg 12). NPP filed bankruptcy on June 2, 1999--well after claimant initiated legal action but before a judgement was rendered.

Civil Judg/Bkcy Filing 09/08/1999  
LRF App Filing 08/10/1999  
Difference -29

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Bankruptcy discharge date confirmed per bankruptcy courts by Examiner. Filing date taken from DOPL date stamp.

Claimant filed claim before bankruptcy was discharged. LRF personnel believe the early filing was part of claimant's apparent attempt to avoid having the claim treated as a formal proceeding.

===== COMPLETE APPLICATION CHECK-LIST =====

Form Submitted	Yes	08/10/1999	
Form Completed	Yes	08/10/1999	
Fee	Yes	08/10/1999	9222-61-0046 ICN
Signed Cert/Aff	Yes	07/15/1999	
Cert of Service	Yes	08/05/1999	
Demog. Questionnaire	Yes	07/15/1999	

===== SUPPORTING DOCUMENTS =====

Written Contract	Yes	Written Contract	04/20/1998
Licensing Statute	Yes	License	09/03/1993
Full Payment	Inc	Affidavit	
Civil Action/Bankrupt	Yes	Complaint	01/13/1999
Entitlement to Pmt.	Yes	Bankruptcy Filing/Ind Evid	06/02/1999
Exhaust Remedies	Yes	Bankruptcy Filing	09/08/1999

===== REQUIRED FACTUAL FINDINGS CHECK-LIST =====

Claimant Qualified Beneficiary Yes

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Claimant is a supplier registered with Fund since November 1, 1995 (ICN 5313-64-0029)

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Written contract exists Yes

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Claimant and NPP have provided copies of contract between homeowner and Original Contractor. Contract was signed by all parties April 20, 1998.

Original Contractor Licensed Yes

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Original contractor held license 93-266-922-5501 as an R100, Residential and Small Commercial Contractor, from June 3, 1993 to March 4, 1999. The license was voluntarily surrendered as part of a disciplinary proceeding.

**Owner PIF to Contractor**

**Bd**

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NPP is contesting payment in full. Both NPP and Claimant will present evidence at the hearing.

**Residence Own/Occ as defined**

**Yes**

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Homeowner provided a complete Owner-Occupied Residence affidavit. The construction in question was remodel work to a home already occupied by the owners. (pg 9).

**Residence Single Family/Duplex**

**Yes**

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Per Owner-Occupied Residence affidavit.

**Contract For QS**

**Yes**

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Claimant provided invoices and billing summarizes to verify sale and delivery of construction materials for use on the incident residence.

**Claimant brought Civil Action**

**Yes**

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Claimant was precluded by bankruptcy from having judgement entered against NPP. Further, NPP has provided evidence showing Claimant's debt was discharged in bankruptcy.

**Exhausted Remedies**

**Yes**

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Bankruptcy action stayed any and all efforts by Claimant to collect debt.

**Adequate \$ in LRF Fund**

**Yes**

**Statutory Limit/Payment**

**no**

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No other claims for this residence.

**Exceed Monetary Cap**

**No**

Comments Page: 001 UserID: ewebster

To date, Claimant has received payments totalling \$286,965.31.

**Un-reimbursed Payments**

no

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To date, Fund has paid \$0 on behalf of Claimant.

===== PAYMENT CHECKLIST =====

	Apportioned %	Claimed
	100.00	
Principal Amount	9,742.99	9,742.99
Pre Attorney Fees	2,000.00	2,250.00
Pre Costs	0.00	241.00
Pre Int. % 1,200.00	0.00	241.00
Post Attorney Fees	0.00	600.00
Post Costs	0.00	75.00
Post Int. % 0.00	0.00	10.86
Total	13,126.76	14,267.47

**QUALIFIED SERVICES COMMENT**

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Total qualified services per invoices and billing summary provided by Claimant.

**PRE JUDGEMENT ATTORNEY FEE COMMENT**

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Per Utah Admin Rule R156-204d(3)(ii) claimant is entitled to attorney fees not to exceed the lesser of 25% of qualified services (in this case \$2, 435,75) or \$2,000.

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**PRE JUDGEMENT COSTS COMMENT**

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Claimant provided judgement showing cost of \$241 awarded. However, judgement is not binding in this case. Additional evidence needed to determine proper amount of pre-judgement costs.

**PRE JUDGEMENT INTEREST COMMENT**

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Per UCA 38-11-203(3)(c) interest calculated at 12% from payment due date to Board approval date, net of delays attributable to the Claimant. Dates used for this claim:

DUE DATE: September 21, 1998. All invoices shows terms of payable on demand. Interest begins last date of qualified services.

CONDITIONAL DENIAL: October 22, 1999: Interest is suspended because this is a delay attributable to the Claimant.

RESPONSE DATE: November 9, 1999: Interest resumes upon receipt of Claimant's response.

BOARD DATE: December 15, 1999: Interest terminates on this date.

POST JUDGEMENT ATTORNEY COMMENT

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Pre-judgement attorney fees already exceed legal limit (see above)

POST JUDGEMENT COSTS COMMENT

Comments Page: 001 UserID: ewebster

Per UCA 38-11-203(3)(d) Claim filing fee is not a reimburseable expense.

POST JUDGEMENT INTEREST COMMENT

Comments Page: 001 UserID: ewebster

All interest included above.

===== DISPOSITION CHECKLIST =====

CLAIM DENIED: Yes

Amount Denied: 14,267.47

Division Order Date: 05/03/2000

Department Order Date:

Appeal Deadline to Dept.: 06/02/2000

Appeal Deadline to Courts.:

Status on Appeal: ?

Status on Appeal - CT: ?

AG Subrogation Referral Date:

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Date Judgement Assigned to DOPL:

Amount Collected in Subrogation

Costs: 0.00

Fees: 0.00

Interest: 0.00

Civil Penalty: 0.00

Interest: 0.00

Total: 0.00

Status of Subrogation:

Payment Request Date:

Finet Document Number:

Finance Transaction Date:

NPP Reimbursement Demand Date:

NPP Reimbursement Deadline Date:

Date Reimbursement Received:

Amount: 0.00

Date Investigation Report Updated:

Status of Investigation:

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BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH

IN THE MATTER OF THE  
LIEN RECOVERY FUND CLAIM OF  
**ANDERSON LUMBER COMPANY**  
REGARDING THE CONSTRUCTION BY  
**MARTIN ALVIN NIELSEN**  
**DBA BOORHAMWOOD HOMES**  
**DBA SANDALWOOD DEVELOPMENT**  
**DBA N & H CONTRACTORS**  
ON THE RESIDENCE OF  
**STEVEN P. MCCONNELL AND**  
**NANCI E. MCCONNELL**

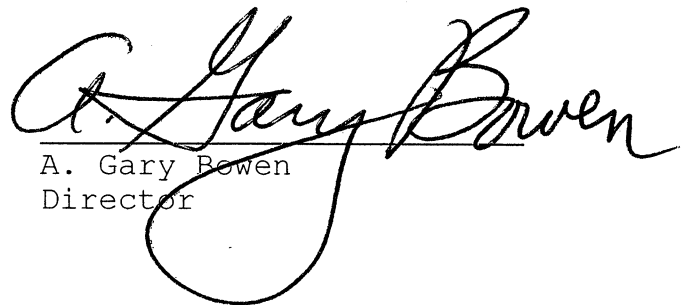
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**O R D E R**

:Claim No. LRF-1999-0801-01

The attached Findings of Fact, Conclusions of Law and Recommended Order are hereby adopted by the Director of the Division of Occupational and Professional Licensing of the State of Utah.

Dated this 3 day of May, 2000.

  
A. Gary Bowen  
Director

S E A L

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH

IN THE MATTER OF THE	:	
LIEN RECOVERY FUND CLAIM OF	:	
<b>ANDERSON LUMBER COMPANY</b>	:	<b>FINDINGS OF FACT</b>
REGARDING THE CONSTRUCTION BY	:	<b>CONCLUSIONS OF LAW</b>
<b>MARTIN ALVIN NIELSEN</b>	:	<b>AND RECOMMENDED ORDER</b>
<b>DBA BOORHAMWOOD HOMES</b>	:	
<b>DBA SANDALWOOD DEVELOPMENT</b>	:	
<b>DBA N &amp; H CONTRACTORS</b>	:	
ON THE RESIDENCE OF	:	Claim No. LRF-1999-0801-01
<b>STEVEN P. MCCONNELL AND</b>	:	
<b>NANCI E. MCCONNELL</b>	:	

**Appearances:**

Clair J. Jaussi and Randy J. Christiansen for Claimant

Anderson Lumber Company

W. Kevin Jackson for Martin Alvin Nielsen

Wayne H. Braunberger for Steven P. and Nanci E. McConnell

Tony R. Patterson for the Division of Occupational  
and Professional Licensing

**BY THE BOARD:**

A December 15, 1999 hearing was conducted in the above-entitled proceeding before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the Residence Lien Recovery Fund Advisory Board. Board members present were Clint Techmeyer, Grant F. Weller, Steven Bankhead, Lynn B. Larsen, Robert A. Burton, Robert W. Arbuckle and Roy F. Jensen. A. Gary Bowen, Director of the Division of Occupational and Professional

Licensing, was periodically present during the course of the hearing.

Thereafter, evidence was offered and received. The Board, being fully advised on the premises, now enters its Findings of Fact, Conclusions of Law and submits the following Recommended Order for review and action by the Division:

#### **FINDINGS OF FACT**

1. Based on Claimant's application, supporting documentation relative thereto and the joint stipulation between Claimant and the Division, Claimant has satisfied all requirements necessary for payment from the Residence Lien Recovery Fund other than the remaining issue to be addressed and resolved by the Board.

2. The original contractor on the McConnell residence was Martin Alvin Nielsen, dba Sandalwood Development. The McConnells entered into a contract with Sandalwood Development on April 20, 1998, whereby Sandalwood Development was to provide new construction and remodeling services on the McConnell residence. Claimant furnished supplies to Sandalwood Development, which were used on the construction project in question.

3. The April 20, 1998 contract reflects a bid of \$65,081.30 for the work to be completed. The contract provides any change orders could increase the cost and that change orders must be in writing. The contract also provides one-third of the total cost

was to be paid prior to commencement of work, one-third would be paid at the passing of the 4-way inspection and the remaining one-third would be paid at the passing of the final inspection.

4. There were various changes in the construction plans during the course of the project. Change orders were made relative to the work to be provided in the kitchen, a shop area and with respect to a vaulted ceiling. No written change orders were prepared and the contracting parties did not resolve the amount of the increased costs for that additional work.

5. The McConnells paid \$20,000 to Sandalwood Development on April 20, 1998. The McConnells made a second \$20,000 payment to Sandalwood Development on July 9, 1998. The April 20, 1998 contract does not reflect the anticipated completion date for the work to be provided by Sandalwood Development. The construction project had not been completed as of October 1998.

6. A punch list was prepared on or about October 17, 1998 to purportedly reflect the additional work to be completed on the project. However, the McConnells and John Nielsen, who is Mr. Nielsen's brother and was acting on his behalf, did not finalize any agreement as to the remaining work to be performed.

7. Based on the substantial evidence presented, the McConnells and Sandalwood Development did not resolve the remaining amount due for the materials and labor which had been provided through mid-October 1998. Based on the substantial and

more credible evidence presented, the \$40,000 paid by the McConnells was not equal to the value of the materials and labor which Sandalwood Development provided through mid-October 1998.

8. Based on the substantial and more credible evidence presented, the McConnells informed the Sandalwood Development in mid-October 1998 that they would not pay an additional \$25,000 to prompt completion of the remaining work based on the original contract and the subsequent change orders to that contract. Accordingly, Sandalwood Development provided no further services on the project.

9. The qualified services provided by the Claimant - if awarded from the Fund - would total \$9,742.99. Prejudgment costs would total \$316. Any allowable prejudgment interest - as calculated to the date of the hearing - would total \$1,383.77. Attorneys' fees would be limited to \$2,000.

#### **CONCLUSIONS OF LAW**

Claimant asserts the McConnells paid Sandalwood Development in full for the work provided on the partial performance of the April 20, 1998 contract. Claimant contends various adjustments should be made to the contractual bid amount for work which was not performed. Claimant also asserts certain credits and offsets should apply toward the amount which would have been otherwise due for work performed under the contract, based on credit for certain materials, labor provided by Mr. McConnell and property

damage purportedly caused by heavy trucks which Sandalwood Development used during the construction project.

U.C.A. §38-11-204(3) provides:

To recover from the fund . . . a qualified beneficiary shall establish that:

. . . . .  
(b) the owner has paid in full the original contractor . . . with whom the owner has a written contract in accordance with the written contract and any amendments to the contract . . . .

The Board had duly considered the terms of the April 20, 1998 contract between the McConnells and Sandalwood Development, and the subsequent amendments to that contract by reason of the nonwritten change orders made with the joint consent of the contracting parties. Based thereon, the substantial and more credible evidence presented and the reasonable inferences drawn therefrom, the \$40,000 paid by the McConnells to Sandalwood Development did not constitute payment in full for all materials and labor provided through mid-October 1998 by the contractor.

There is also a lack of credible evidence to find that the offsets and credits claimed by the McConnells would reduce the outstanding balance owed to Sandalwood Development as to warrant a finding that there was full payment made for all materials and services provided. Accordingly, Claimant has failed to establish - by a preponderance of the evidence - that it has satisfied all requirements necessary for recovery from the Fund.

The Board also notes Claimant's assertion that Third District Court proceedings were conducted which involved litigation between Claimant and the McConnells. Claimant contends the Order entered in that proceeding, whereby the Court found Claimant had paid the original contractor in full for all services provided under the contract, should be given res judicata effect in this case.

Neither Sandalwood Development nor Mr. Nielsen were joined as a party in that lawsuit. Neither Sandalwood Development nor Mr. Nielsen were in privity to any party to that lawsuit. Further, whether Sandalwood Development had been paid in full was not an issue which was "fully, fairly and competently" litigated in that proceeding. See Madsen v. Borthick, 769 P.2d 245, 250 (Utah 1988). The Board thus squarely rejects Claimant's assertion that res judicata effect should be accorded the Order entered in that case as to prompt payment of this claim from the Fund.

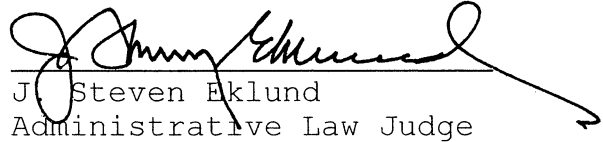
The Board duly acknowledges it may be somewhat harsh and arguably inequitable to deny Claimant recovery from the Fund under the circumstances presented in this case. However, this Board lacks any authority to disregard the statutory requirements which unmistakably govern possible recovery from the Fund. Accordingly, the Board finds and concludes Claimant has not established the necessary factual and legal basis for any such

recovery in this case.

**RECOMMENDED ORDER**

WHEREFORE, IT IS ORDERED Claim No. LRF-1999-0801-01 is denied, consistent with the views expressed herein.

On behalf of the Residence Lien Recovery Fund Advisory Board, I hereby certify the foregoing Findings of Fact, Conclusions of Law and Recommended Order was submitted to A. Gary Bowen, Director of the Division of Occupational and Professional Licensing on the 3rd day of May, 2000 for his review and action.

  
J. Steven Eklund  
Administrative Law Judge



MAILING CERTIFICATE

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2000, a true and correct copy of the foregoing Order was sent first class mail, postage prepaid, to the following:

WIL MOYER  
ANDERSON LUMBER COMPANY  
PO BOX 9459  
OGDEN UT 84409-9459

Claimant

RANDY CHRISTIANSEN ESQ  
CLAIR JAUSSE ESQ  
PO BOX 2282  
PROVO UT 84603-2282

Counsel for Claimant

MARTIN ALVIN NIELSEN  
9563 S 2700 W  
SOUTH JORDAN UT 84095-9401

Non-Paying Party

W KEVIN JACKSON ESQ  
JENSEN DUFFIN CARMAN DIB & JACKSON  
311 S STATE ST STE 380  
SALT LAKE CITY UT 84111-5215

Counsel for Non-Paying Party

STEVE & Nanci McCONNELL  
2929 ELLA ST  
WEST JORDAN UT 84088-8635

Homeowners

WAYNE H BRAUNBERGER ESQ  
ASHTON BRAUNBERGER & BOUD PC  
765 E 9000 S STE A1  
SANDY UT 84094-3083

Counsel for Homeowners

TONY PATTERSON ESQ  
OFFICE OF ATTORNEY GENERAL  
VIA HAND DELIVERY

Counsel for the Residence Lien Recovery Fund

---

Kathie Schwab, Program Secretary

MAILING CERTIFICATE

I hereby certify that on the 5 day of May, 2000, a true and correct copy of the foregoing Order was sent first class mail, postage prepaid, to the following:

WIL MOYER  
ANDERSON LUMBER COMPANY  
PO BOX 9459  
OGDEN UT 84409-9459

Claimant

RANDY CHRISTIANSEN ESQ  
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PROVO UT 84603-2282

Counsel for Claimant

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Counsel for Non-Paying Party

STEVE & Nanci M<sup>c</sup>CONNELL  
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Homeowners

WAYNE H BRAUNBERGER ESQ  
ASHTON BRAUNBERGER & BOUD PC  
765 E 9000 S STE A1  
SANDY UT 84094-3083

Counsel for Homeowners

TONY PATTERSON ESQ  
OFFICE OF ATTORNEY GENERAL  
VIA HAND DELIVERY

Counsel for the Residence Lien Recovery Fund

  
Kathie Schwab, Program Secretary